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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 272

ARTHUR TERMINIELLO,
Petitioner

vs.

CITY OF CHICAGO,
Respondent

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT THEREOF.

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae

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MAY IT PLEASE THE COURT:

The undersigned as counsel for the American Civil Liberties Union respectfully moves the Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae*. The consent of the attorney for the petitioner and of the respondent to the filing of this brief has been requested and the same was given by respondent City of Chicago, but was refused by counsel for petitioner.

Reasons in support of this motion are submitted as follows:

1. The American Civil Liberties Union is a nationwide organization, and through its charter, provides as its pur-

pose, among others, "To maintain throughout the United States and its possessions the rights of free speech, free press and free assemblage and other civil rights, and to take all legitimate action in furtherance of such purpose."

2. The American Civil Liberties Union submits that the petitioner in this cause was found guilty by a jury in the Municipal Court of Chicago of disorderly conduct, and he was assessed with a fine of one hundred ($100.00) dollars and costs in the amount of ten ($10.00) dollars. He was charged with having violated that section of the revised code of 1939 of the City of Chicago, which proscribes an act described as, "Did make or aid in making an improper noise or diversion tending to a breach of the peace within the limits of the City" (R. 53). The charges grew out of the occasion when petitioner delivered a speech within a hall in the City of Chicago, and certain persons protested against delivery of the speech during which a disturbance took place (R. 6-8).

The charges against petitioner were tried before a jury (R. 53) and after the finding of guilty, he appealed to the Illinois Appellate Court for the First District, which court affirmed the verdict of the jury (*City of Chicago* v. *Terminiello*, 332 Ill. App. 17) (R. 1-19), two of the judges concurring and one dissenting (R. 19-30).

A petition for leave to appeal was filed and allowed to the Supreme Court of Illinois (R. 1 and 134). The Supreme Court affirmed the verdict in *City of Chicago* v. *Terminiello*, 400 Ill. 23 (R. 145). A petition for rehearing was filed and denied (R. 146).

Subsequently, petitioner filed, before this court, his petition for a Writ of Certiorari on September 11, 1948, which petition was thereafter granted.

3. The American Civil Liberties Union submits that the freedom of speech involved in the instant petition, is a

basic tenet of the rights of the citizens, granted to them by the Constitution. The conviction of the petitioner—regardless of the subject matter of his speech and unless delivery of the speech constituted a present danger—is a violation of the Constitutional privilege of freedom of speech and is contrary to the provisions of the Federal and the Illinois Constitution.

4. The American Civil Liberties Union, in accordance with its purpose and as is provided by its charter desires to file a brief *Amicus Curiae*, to oppose the decision of the Trial Jury and Court, as well as the decisions of the Appellate Court of Illinois and of the Supreme Court of the State.

Wherefore: It is respectfully requested that leave may be granted to the American Civil Liberties Union to file the accompanying brief in this case as *Amicus Curiae*.

Respectfully submitted,

FRANCIS HEISLER,

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WILLIAM E. RODRIGUEZ,
CHARLES LIEBMAN,
OSMOND K. FRAENKEL,
Counsel for the American Civil Liberties Union—Amicus Curiae.

January 26, 1949.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 272

ARTHUR TERMINIELLO,

Petitioner,

vs.

CITY OF CHICAGO,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

STATEMENT OF THE CASE.

The petition for a Writ of Certiorari heretofore allowed by this court, asked to review a decree of the Supreme Court of the State of Illinois, entered on March 18, 1948 (R. 145) in which that court affirmed the judgment of the Municipal Court of Chicago of April 8, 1946 (R. 55), in affirming the decree of the Illinois Appellate Court of June 25, 1947 (R. 133). Petitioner was found guilty by a jury of the Municipal Court of Chicago, of violating Sub-Section 1 of Section 1 of Chapter 193 of the Revised Code of 1939 of the City of Chicago, which provides:

> "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach

> of the peace, within the limits of the city . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each 'offence" (R. 53).

The evidence on which petitioner was so found guilty is discussed in detail both in the opinion of the Illinois Appellate Court, *City of Chicago* v. *Terminiello*, 332 Ill. App. 17 and by the Illinois Supreme Court, *City of Chicago* v. *Terminiello*, 400 Ill. 23, and it is apparent that there is little controversy as to the actual facts.

It appears to us that both Illinois Appeal Courts went to great length to discuss, while apparently concerned with the Constitutional guaranty of freedom of speech, issues which are at least subsidiary. We propose to discuss only the question whether or not petitioner's conviction can stand as against the Constitutional guaranty given by the First Amendment.

As to the facts on which the conviction of petitioner is based, we shall rely on the majority opinion of the Illinois Appellate Court, from which we take it that petitioner was invited to speak in the auditorium of a building and that a printed invitation, signed by one Gerald L. K. Smith and accompanied by free-admission tickets, was distributed. The meeting was to begin at 8:00 P. M. However;

> "Around the hour of 6:30 P. M. of the day of the meeting, *a crowd gathered* in front of the building and a picket line was formed by those *in apparent protest to the appearance of the defendant* (referring *to the petitioner here*) *and the holding of such meeting;* that the size of the picket line was described variously from 250 to 500 in number . . . *this crowd and the picket line . . . were there before the start of the meeting* . . . a cordon of police was stationed around the outside of the meeting hall before the start of the meeting . . . the picket line carried banners with in-

> scriptions condemnatory of the meeting and it was so formed as to obstruct and interfere with the free access to the meeting by those entitled to enter. The crowd around the building was a surging, howling mob, hurling epithets at those **seeking to get into the meeting. Before the defendant spoke, those inside the hall could hear the loud noises and the yelling and hollering on the outside. . . . Bricks were thrown through the window panes before the speaking started and during the speaking . . . throughout the meeting they kept breaking the windows of the meeting hall** . . . (Emphasis ours).

Petitioner himself testified (again quoting from the majority opinion of the Appellate Court of Illinois):

> ". . . that *he arrived at the meeting* with Smith . . . in a hired car; that the car stopped at the front entrance, and *a crowd of 300 or 400 congregated, shouting, cursing and picketing;* that *they had to form a flying wedge to get through the picket line*, and that *police escorted them to the building; . . . when he entered the building he heard the howls of the people outside . . .*" (Emphasis ours.)

The speech delivered by the petitioner appears on pages 68 to 79 of the Record. Both the Appellate Court of Illinois and the Supreme Court of Illinois quote extensively from the stenographic transcript of the speech, and it is apparent that both of these courts considered petitioner's speech as highly intemperate. The majority opinion of the Appellate Court concludes with reference to the content of petitioner's speech, that:

> "If these statements, coupled with the rest of his speech are not an appeal to fury and incitement to disorder and violence, then these words lose their English meaning."

The opinion of the Supreme Court of Illinois stated that petitioner's:

> ". . . speech tended to incite the majority of his audi-

ence to immediate violence against the angry mob outside."

Notwithstanding of such a conclusion and notwithstanding the violence without, both Illinois Courts agree that the record discloses no violence in the hall where petitioner spoke, with the possible exception of the scene created by one member of the audience who at one point of the speech (either that of the petitioner or that of Smith) shouted: "You are a God damned liar"; after which the disturber "was ushered out by the police". One of the witnesses before the jury testified that:

> ". . . when the defendant made the statement that there was no crime too great for the Jews to commit, the woman next to her said, 'Yes the Jews are killers, murderers. If we don't kill them first, they will kill us', and that when he made reference to the Jewish nurses innoculating German women and children with syphilis and typhus germs and other disease germs, she heard people around her say, 'Why, that's terrible,' 'That is a terrible thing';"

"That at another point in his speech, she heard one in the audience say that if the Jews were not killed first, they would kill the Christians." Another witness testified that:

> ". . . during the speech of the defendant, when he made reference to the story of the non-Christian doctors and nurses, he heard expressions of anger from the audience; that he heard a man in the back of him say that the Jews, 'niggers' and Catholics would have to be gotten rid of . . . that he heard various howls, hoots, cries and shouts at various points in his speech; that he heard comments by people in the hall during the course of the speech; that when defendant spoke of the slimy scum and skunks, he heard people in the hall shout and cry out 'Tell them, Father', or 'That is right' . . . he testified that the audience was not calm; that they were disturbed and angry."
>
> ". . . he heard people around him in the audience holler, 'Yes, send the Jews back to Russia. Kill the Jews'; 'Dirty Kikes'; that when defendant referred to

> the Morgenthau plan to starve the German women and children; he heard some of the audience say, 'They ought to starve the Jews', 'They ought to kill Morgenthau', 'They ought to do the same things to him that he is doing to the Germans' . . . that on every occasion, when the people stood up while defendant was speaking, they applauded and they made violent shouts, such as 'Dirty Kike, kill the Jew, send them back to Russia.'"

There is no contradiction in the testimony before the jury that petitioner stated in his speech:

> "We are in for a profound revolution. Those of us who realize the inevitableness of the revolution, and are anxious that it be gradual and bloodless instead of somewhat bloody. Of course, if necessary, we will have it more bloody. . . . Now, all of this that is going on, all of this noise that you hear around, is a part of a great plan to enrich a few at the expense of the many. . . . Didn't you ever read the Morgenthau plan for the starvation of little babies and pregnant women in Germany? . . . Why should every child in Germany not live to be more than two or three months of age? Because Morgenthau wants it that way, and so did F. D. R. . . . You will know who is behind it when I tell you the story of a doctor in Akron, Ohio. He boasted to a friend of mine within the last few days, while he was in the service of this country as a doctor, he and others of his kind made it a practice—now, this was not only one man—made it a practice to amputate the limbs of every German they came in contact with whenever they could get away with it; so, that they could never carry a gun. . . . The nurses, they tell me are going to inject disease in them, syphilis and other diseases in every one that came there, all of one race, all non-Christians. . . . We will not be tolerant of that mob out there. We are not going to be tolerant any longer. We are strong enough. We are not going to be tolerant of their smears any longer. We are going to stand up and date them to smear us. . . ."

The majority opinion of the Appellate Court of Illinois said:

"It was in this setting and surrounding atmosphere, an atmosphere full of tenseness, mob excitement, with an audience, as we have pointed out, stirred to emotional reaction, that the defendant delivered his speech. The jury heard from the defendant that he had previously had difficulty of the same character in the City of Cleveland, where he undertook to address a meeting and was threatened and surrounded. . . . The jury had the right to believe that the defendant knew that the very presence of Gerald L. K. Smith with him at a meeting of this type would likely produce a mob gathering and mob resentment and violence. . . . Knowing all this and the likelihood of the effect that such a speech as the instant one would have upon an audience under such conditions, we do find that defendant's speech and conduct not only had a tendency to create a diversion tending to a breach of the peace but, in reality, there was created such a diversion and breach of the peace. No other reaction could reasonably be expected . . ."

The Supreme Court of Illinois concluded on the record that:

"As to the majority of the audience, defendant by his provocative and inflammatory utterances, instilled in them the fear of revolution, domination and murder by what he described as the criminal Jewish element in America and, more particularly, by the mob outside the auditorium. . . . In this manner was defendant guilty of a diversion tending to a breach of the peace by his wild, intemperate and inflammatory utterances. His speech tended to incite the majority of his audience to immediate violence against the angry mob outside. That his listeners did not engage in violence with the angry crowd is immaterial."

As applied to the facts in this case, the ordinance in question and the conviction thereon was, as we submit, in conflict with the First Amendment of the Federal Constitution. It is our contention that in its application, the City Ordinance of Chicago is repugnant to Section 1 of the XIVth Amendment of the Constitution of the United States.

ARGUMENT.

The Ordinance of the City of Chicago invoked against the petitioner is applied contrary to the provisions of the First Amendment of the Federal Constitution.

We submit that on the record, the Ordinance of the City of Chicago referred to in the common parlance as the "Disorderly Conduct Ordinance" cannot cover facts as in the instant case, in the face of the provisions of the First Amendment to the Federal Constitution concerning freedom of speech. We also submit what is apparent from the recitation of the facts, the majority opinion of the Appellate Court of Illinois and the Supreme Court of the State, that while there was a great deal of disturbance outside of the hall, in anticipation of the appearance of the petitioner and the speech to be delivered by him, there was nothing transpiring within the hall, and within the audience, that could be considered forbidden by the provisions of the ordinance invoked. If appears to us that the decision in this case, if permitted to stand, will create a dangerous precedent to abridge freedom of speech in this country, in that an advance censorship by opponents of a speaker will become legalized.

We have, of course, no quarrel with the condemnatory language of the majority opinion of the Illinois Appellate Court and of the Supreme Court of Illinois as to the content of petitioner's speech. What we are attempting to make clear, is that the violence, the disturbance, the picketing of the hall by a disorderly mob, had for its purpose to prevent petitioner from delivering his speech, because *it was anticipated by the mob that his speech would be just the kind of speech that he in fact delivered.*

We agree with Lord Justice Scrutton who stated:

> "The law of this country has been very jealous of any infringement of personal liberty. This care is not to be exercised less vigilently because the subject whose liberty is in question may not be particularly meritorious. It is indeed one test of belief in principles if you apply them to cases with which you have no sympathy at all. You really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous. *Rex* v. *Secretary of State, Ex Parte O'Brien* (2 K. B. 382).

We agree with the Illinois Courts that petitioner and his speech, to say the least are not meritorious. However, the test of belief in principles is made when one applies them to cases with which one has no sympathy at all. There is no denial, if one reads the majority opinions of the Illinois Appellate Court and the Supreme Court of Illinois, that both of those courts applied the ordinance in question—in retrospect as it were—and because of the subsequent events, presumed that it is justifiable to conclude that the violence of the mob outside the hall, beginning about an hour and one-half or two hours before the speech was actually delivered, was created by the subsequently delivered speech. It is hard, if not impossible, to comprehend how petitioner was able, by his appearance at 8:00 o'clock, to create a diversion or disturbance of peace within a mob that gathered before the auditorium an hour and one-half or two hours before that hour, *to prevent* petitioner from delivering the speech.

If we follow the reasoning of the majority opinion of the Illinois Appellate Court and of the Supreme Court, the conclusion must be that a person who knows, from the presence of a hostile crowd, that his speech will be resented because of the controversial nature of his thoughts, must desist from making the speech—otherwise he will be found

guilty of violating the disorderly conduct ordinance of the City of Chicago.

An interesting thought occurs in this connection and that is, assuming that petitioner, upon arriving at the scene and seeing pickets, the signs and the howling mob, the sentiment of which was directed against him, would have changed his mind and had refrained from delivering the speech. There is no question that the disorder already had taken place. The disorder was created by the anticipation of the mob as to the speech to be delivered by petitioner. Would petitioner then still be guilty of violating the ordinance? It seems to us that if the decision of the Illinois Supreme Court is to stand, that that would be a logical conclusion.

There is, however, another possible extension of the present ruling of the Supreme Court of Illinois. It seems that the same would proscribe the delivery of any speech as long as there is a group of men and women so much opposed to the prospective speech that it is willing to go out and attempt, by mob demonstration, to prevent the speaker from entering the hall or if he does succeed in doing so, from delivering his speech.

We submit that there is a dangerous possibility as to the legalization of advance censorship of any speech that finds no pleasure in the minds of a group of opponents.

There is little controversy concerning the proposition that peace is good. There is almost unanimous agreement that advocacy of peace among nations is a commendable one. Nevertheless, under the present decision of the Supreme Court of Illinois, it can be visualized that an advocate of peace may be found guilty of the violation of the ordinance of the City of Chicago under conditions as follows: A person of unquestioned integrity, of high moral character and a firm believer in peace does—to advance his peace aims—

hire a hall where he intends to and subsequently does deliver a speech based on brotherhood of all mankind, in condemnation of the use of force among nations and in advocacy of establishing peaceful relations with a nation with which ours is at war. It is not impossible to visualize that there are people with no kindness in their heart, with no respect to their ancestors and with no charity to children of their own and others, and who desire to prevent the delivery of the peace harangue. It is possible to see such bitter men and women congregating around the hall one and one-half or two hours before the speech is to be delivered. They are carrying signs condemning the peace advocate. They are determined that the speaker is not to reach the hall or if he does, he be prevented from speaking and the audience from hearing him by creating commotion, disorder, breaking of windows and by other means usually at the disposal of a disorderly crowd. The peace advocate, believing that it is his duty to preach peace, and believing that his is the right under our Constitution freely to speak, reaches the hall and delivers his speech. Is it far-fetched to say that under the decision of the Supreme Court of Illinois and under the circumstances hereinabove described the peace advocate would have been guilty of violating the city ordinance pertaining to disorderly conduct?

The present decision of the Supreme Court of Illinois, if permitted to stand, will effectively take away the right of anyone freely to speak just as soon as there are others determined enough to express their collective disapproval of the speech to be delivered. The implications of the decision here involved carries a foreboding that the First Amendment to the Federal Constitution can be nullified by a reverse English as it were. It can be nullified because one has to do nothing more to make his opponent's right to freedom of expression a nullity than to gather a crowd

of rowdies in advance of the proposed speech and to express as vociferously as possible his disagreement with the speaker.

We do not believe that this is the law and therefore we believe that the decision of the Supreme Court of Illinois ought to be reversed.

* * *

The majority opinion of the Illinois Appellate Court took cognizance of certain facts:

> "The demonstration on the outside of the meeting hall is one we must condemn as un-American and as clear a violation of law as can come to the observation of any court. Many of them were arrested but the police should have done their full duty by dispersing the mob and suppressing the demonstration."

We are in full agreement with that statement of the court and we are also in full agreement with the further statement: "However, this demonstration is no defense to the charge against this defendant." We disagree, however, that the demonstration could, in law, have been caused by the subsequent speech of the petitioner.

There is indication in the majority opinion of the Appellate Court that the diversion and the gathering of the hostile mob were created by the past performance of petitioner. It is stated that:

> "The jury had a right to believe that the defendant knew that the very presence of Gerald L. K. Smith with him at a meeting of this type would likely produce a mob gathering and mob resentment and violence."

If petitioner's past conduct justified the finding of the jury and the subsequent conclusion of the court in agreement therewith, that such was the cause of the mob's disorder, another question arises.

Let us assume that petitioner, following his prior speech,

which created a disturbance in Cleveland to which the majority opinion of the Illinois Appellate Court refers, would have had a change of heart. It is not beyond the realm of possibility that he, a priest of the church, would actually desire to follow in the footstep of the "Prince of Peace" and would have decided to deliver a speech in Chicago, which represented no "double Talk" as the Supreme Court of Illinois referred to his delivered speech, but truly a Christian speech calling upon the audience to love their neighbor, that they turn the other cheek and that they do unto others as they would want others to do unto them. Nevertheless, the hostile crowd, wrongly anticipating his speech to be delivered, creates a disturbance and so the diversion is an accomplished fact. The speech, however, is one contrary to the mob's expectation—one of love, of human kindness and of endeavor to influence the audience to live in accordance with the precepts of human decency. Would petitioner still be guilty of having created a diversion? It seems to us that under the decision of the Supreme Court, he would indeed be guilty of having created the violence of the mob so wrongly anticipating the content of the speech.

The examples can be multiplied to show the possible application of the Supreme Court decision here involved, *ad absurdum*. The American Civil Liberties Union, greatly concerned in the preservation of freedom of speech in this country, believes that the decision of the Supreme Court of Illinois is impregnated with danger and if permitted to stand, will greatly curtail the right of the citizens to freedom of speech and will, in effect, legalize prior censorship of controversial speeches by antagonistic elements thereto.

Conclusion

It is respectfully urged that the decision and the decree of the Supreme Court of Illinois of March 18, 1948, affirming judgments of the Municipal Court of Chicago of April 8, 1946 and the Illinois Appellate Court for the First District of June 25, 1947, be reversed.

Respectfully submitted,

American Civil Liberties Union
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